Tan Sri David Chiu Tat-Cheong v Seema Elizabeth Soy

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(W)-1320–07 OF 2021
HANIPAH FARIKULLAH, AZIZAH NAWAWI AND NANTHA BALAN JJCA
31 MARCH 2023

Tort — Defamation — Publication — Publication of 'half-truth' statement — Respondent posted text message in WhatsApp group that appellant was previously arrested and charged for financial misconduct — Respondent failed to state that appellant was acquitted — Whether publication of 'half-truth' could constitute false statement — Whether impugned text message defamatory of appellant — Whether defence of qualified privilege proven — Whether impugned text message was 'mere reporting' — Whether appellant entitled to damages — Rules of Court 2012 O 18 r 12(1A)

The appellant was the chairman and founder of Malaysia Land Properties Sdn Bhd ('Mayland') which developed Waldorf & Windsor Towers Service Apartments ('W&W') whereas the respondent was a unit owner of a property at W&W. There were several court's actions between W&W and Mayland and in one of the actions, the court found that Mayland had defrauded and/or made false representations to W&W owners in respect of a common area in W&W. The court's actions between Mayland and W&W were not an issue in the present action, instead, the appellant was disgruntled with the respondent's text message ('the impugned text') in the W&W owners' WhatsApp group stating that the appellant and his father were arrested and charged for offences involving financial misconduct in Hong Kong. The appellant contended that the impugned text was a 'half-truth' because the respondent failed to mention that the appellant and his father was subsequently acquitted. In response to this argument, the respondent stated that the impugned text was not meant to be the full account of W&W matters and she had urged the WhatsApp group participants to find out more via Google ('the disclaimer'). The appellant further argued that the impugned text message contained serious allegations which were directed at Mayland, the appellant, his family members, and the Chiu family. The appellant then brought a defamation action against the respondent and claimed damages amounting to RM1.5m, but the judicial commissioner ('the JC') dismissed the appellant's action premised on the findings, inter alia, that: (a) the impugned text was not defamatory of the appellant; (b) the clear dichotomy of the words used by the respondent showed the different treatment in the subject of the appellant and Mayland; (c) there was no malice; and (d) the defence of justification, qualified privilege and fair comment were proven. Aggrieved by the decision, the appellant brought the

present appeal. The issue arose in the present appeal was whether the publication of a 'half-truth' could constitute a false statement

Held, allowing the appeal, and setting aside the JD's decision with costs of RM100,000 subject to payment of allocator:

(1) In law, a person would be regarded as being actuated by malice if he was reckless or indifferent to the truth. The respondent in the present appeal was fully aware that the appellant had been acquitted of the charges involving financial misconduct, but she chose not to disclose this to the participants in the WhatsApp group. It was clear and obvious that non-disclosure of the appellant's acquittal was deliberate, and this was hardly 'fair' to the appellant. On totality of the facts and circumstances, the respondent had displayed an indifferent attitude which significantly warranted an inference of malice. In the circumstances, the court's finding of malice on the respondent's part demolished the defence of qualified privilege and fair comment (see paras 28, 30 & 32–33).

(2) The JC erred in accepting the respondent's explanation that there was a so-called 'dichotomy' in the way in which the appellant and Mayland were described. No doubt different words were used by the respondent in describing the appellant as compared with Mayland. But it would be wrong to dissect the impugned text and to view the statements in isolation. What must be done was to view that impugned text as a whole. And the impugned text as a whole gave the clear impression that the appellant was guilty, liable for, or predisposed to dishonesty, fraud or misrepresentation. Therein lay the 'sting' of the impugned text (see paras 47–48).

(3) The respondent could not say that the impugned text was just 'mere reporting' because it was a well scripted text with a clear purpose to impugn the appellant's reputation so that the participants of the WhatsApp group form the view that the appellant and Mayland were one and the same and that just as Mayland was found liable for fraud and misrepresentation, the appellant too was dishonest and a fraudster as he had been arrested and charged with offences involving financial misconduct (see para 54).

(4) The court found that the words in the impugned text conveyed to the ordinary man that the appellant was dishonest and a fraudster. Whilst it was legitimate for the respondent to discuss Mayland's conduct, behavior, misconduct or other unlawful activity, the action of the respondent to equate the appellant with Mayland and ascribe or impute Mayland's wrongful conduct to the appellant by reason of his previous arrest and criminal charge, of which he was acquitted and which was not mentioned in the impugned text, rendered the impugned text to be inherently and egregiously defamatory of the appellant (see paras 61–62).

(5) The disclaimer did not give the respondent a free pass such that it exonerated her from liability for having defamed the appellant. The omission to paint the full picture was the very nature and essence of the concept of 'half-truth' which established liability for defamation in circumstances where the failure to present the requisite information portrayed a false impression in the minds of the ordinary person. Thus, even if the fact that the appellant was previously arrested and charged was true, the defence of justification failed as the impression created by the impugned text was one of utter falsity. The false impression that was created was that the appellant was convicted, was a dishonest person, and a fraudster (see paras 65–66 & 69).

(6) It was trite that in libel cases, damages were 'presumed'. In the present case, the impugned text was circulated to a limited group ie, within the W&W WhatsApp group. Since the administrator of the WhatsApp group administered a rebuke to the respondent about 10 days after the impugned text was circulated, it might be presumed that it was or may have been 'deleted'. At any rate, there was no evidence of any 're-publication'. In the circumstances, the appellant was not entitled to RM1.5m damages as pleaded. As rightly mentioned by the JC, the plea of RM1.5m in the statement of claim was contrary to O 18 r 12(1A) of the Rules of Court 2012. Considering the appellant's status as an international businessman and that the impugned text was not widely circulated, damages in the sum of RM100,000 would be fair and reasonable to vindicate the appellant's reputation which had been sullied by the impugned text. The court further ordered permanent injunction against the respondent and costs of RM100,000 to the appellant (see paras 71–72 & 75).

[Bahasa Malaysia summary

Perayu adalah pengerusi dan pengasas Malaysia Land Properties Sdn Bhd ('Mayland') yang membangunkan Waldorf & Windsor Towers Service Apartments ('W&W') manakala responden adalah pemilik unit hartanah di dalam W&W. Terdapat beberapa tindakan mahkamah antara W&W dan Mayland dan dalam salah satu tindakan, mahkamah mendapati bahawa Mayland telah menipu dan/atau membuat representasi palsu kepada pemilik-pemilik unit W&W berkenaan dengan kawasan bersama dalam W&W. Tindakan mahkamah antara Mayland dan W&W tidak menjadi isu dalam tindakan semasa, sebaliknya, perayu tidak berpuas hati dengan mesej teks responden ('teks yang disangkal tersebut') dalam kumpulan WhatsApp pemilik W&W yang menyatakan bahawa perayu dan bapanya telah ditangkap dan didakwa atas kesalahan yang melibatkan salah laku kewangan di Hong Kong. Perayu berhujah bahawa teks yang disangkal tersebut adalah 'separuh kebenaran' kerana responden gagal menyebut bahawa perayu dan bapanya kemudiannya dibebaskan. Sebagai tindak balas kepada hujah ini, responden

menyatakan bahawa teks yang disangkal tersebut tidak dimaksudkan sebagai gambaran penuh bagi perkara-perkara yang berkaitan dengan W&W dan dia telah menggesa peserta kumpulan WhatsApp tersebut untuk mengetahui lebih lanjut melalui Google ('penafian tersebut'). Perayu seterusnya berhujah bahawa mesej teks yang disangkal tersebut mengandungi dakwaan yang serius yang ditujukan kepada Mayland, perayu, ahli keluarganya, dan keluarga Chiu. Perayu kemudian membawa tindakan fitnah terhadap responden dan menuntut ganti rugi berjumlah RM1.5 juta, tetapi pesuruhjaya kehakiman ('PK') menolak tindakan perayu berdasarkan dapatan-dapatan, antara lain, bahawa: (a) teks yang dipertikaikan tersebut tidak memfitnah perayu; (b) dikotomi yang jelas bagi perkataan yang digunakan oleh responden menunjukkan perlakuan yang berbeza dalam subjek perayu dan Mayland; (c) tidak terdapat niat jahat; dan (d) pembelaan justifikasi, perlindungan bersyarat dan ulasan yang adil telah dibuktikan. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa. Isu yang timbul dalam rayuan semasa adalah sama ada penerbitan 'separuh kebenaran' boleh menjadi kenyataan palsu.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan PK dengan kos sebanyak RM100,000 tertakluk kepada bayaran alokator:

(1) Dalam undang-undang, seseorang akan dianggap sebagai digerakkan oleh niat jahat jika dia bertindak melulu atau tidak peduli dengan kebenaran. Responden dalam rayuan ini menyedari sepenuhnya bahawa perayu telah dibebaskan daripada pertuduhan yang melibatkan salah laku kewangan, tetapi dia memilih untuk tidak mendedahkan perkara ini kepada peserta dalam kumpulan WhatsApp tersebut. Adalah jelas dan nyata bahawa ketidakdedahan pembebasan perayu adalah disengajakan, dan ini tidak 'adil' kepada perayu. Dari segi keseluruhan fakta dan keadaan, responden telah menunjukkan sikap tidak peduli yang secara signifikan memerlukan inferens niat jahat. Dalam keadaan tersebut, dapatan mahkamah berkenaan dengan niat jahat di pihak responden telah merobohkan pembelaan perlindungan bersyarat dan ulasan yang adil (lihat perenggan 28, 30 & 32–33).

(2) Pesuruhjaya kehakiman terkhilaf dalam menerima penjelasan responden bahawa terdapat apa yang dipanggil 'dikotomi' dalam cara perayu dan Mayland digambarkan. Tidak dinafikan perkataan berbeza digunakan oleh responden dalam menggambarkan perayu berbanding dengan Mayland. Tetapi adalah salah untuk membahagikan teks yang disangkal tersebut dan melihat kenyataan-kenyataan tersebut secara berasingan. Apa yang perlu dilakukan ialah melihat teks yang disangkal tersebut secara keseluruhan. Dan teks yang disangkal tersebut secara keseluruhannya memberikan gambaran yang jelas bahawa perayu bersalah, bertanggungjawab, atau terdedah kepada ketidakjujuran, penipuan atau salah nyataan. Di dalamnya terdapat 'sengat' bagi teks

yang dipertikaikan tersebut (lihat perenggan 47–48).

(3) Responden tidak boleh mengatakan bahawa teks yang disangkal tersebut hanyalah 'laporan semata-mata' kerana ia adalah teks yang ditulis dengan baik dengan tujuan yang jelas untuk mencemarkan nama baik perayu supaya peserta kumpulan WhatsApp tersebut membentuk pandangan bahawa perayu dan Mayland adalah serupa dan seperti Mayland yang didapati bersalah atas penipuan dan salah nyataan, perayu juga tidak jujur dan penipu kerana dia telah ditangkap dan didakwa atas kesalahan yang melibatkan salah laku kewangan (lihat perenggan 54).

(4) Mahkamah mendapati bahawa perkataan dalam teks yang disangkal tersebut menyampaikan kepada orang biasa bahawa perayu adalah tidak jujur dan penipu. Walaupun adalah sah untuk responden membincangkan kelakuan, tingkah laku, salah laku atau aktiviti menyalahi undang-undang oleh Mayland, tindakan responden untuk menyamakan perayu dengan Mayland dan menganggap atau mengaitkan kelakuan salah Mayland kepada perayu atas sebab penahanan dan pertuduhan jenayahnya sebelum ini, yang mana dia telah dibebaskan dan yang tidak disebut dalam teks yang disangkal tersebut, menjadikan teks yang disangkal tersebut secara semula jadi dan sangat memfitnah perayu (lihat perenggan 61–62).

(5) Penafian tersebut tidak memberikan responden pas percuma sehingga boleh membebaskannya daripada liabiliti kerana telah memfitnah perayu. Peninggalan untuk memberikan gambaran penuh adalah sifat dan intipati konsep 'separuh kebenaran' yang menetapkan liabiliti untuk fitnah dalam keadaan di mana kegagalan untuk membentangkan maklumat yang diperlukan telah menggambarkan tanggapan palsu dalam fikiran orang biasa. Oleh itu, walaupun fakta bahawa perayu telah ditangkap dan didakwa sebelum ini adalah benar, pembelaan justifikasi gagal kerana tanggapan yang ditimbulkan oleh teks yang disangkal tersebut adalah satu kepalsuan yang nyata. Tanggapan palsu yang ditimbulkan ialah perayu telah disabitkan kesalahan, merupakan seorang yang tidak jujur, dan seorang penipu (lihat perenggan 65–66 & 69).

(6) Sudah menjadi undang-undang yang mantap bahawa dalam kes libel, ganti rugi adalah 'dianggap'. Dalam kes ini, teks yang disangkal tersebut telah diedarkan kepada kumpulan yang terhad iaitu, dalam kumpulan WhatsApp W&W. Memandangkan pentadbir kumpulan WhatsApp tersebut memberikan teguran kepada responden kira-kira 10 hari selepas teks yang disangkal tersebut diedarkan, mungkin boleh dianggap bahawa teks tersebut telah atau mungkin telah 'dipadamkan'. Bagaimanapun, tidak ada bukti tentang apa-apa 'penerbitan semula'. Dalam keadaan tersebut, perayu tidak berhak menerima ganti rugi sebanyak RM1.5 juta seperti yang diplid. Seperti yang dinyatakan dengan betul oleh PK, tuntutan sebanyak RM1.5 juta dalam pernyataan tuntutan adalah

bertentangan dengan A 18 k 12(1A) Kaedah-Kaedah Mahkamah 2012. Mengambil kira status perayu sebagai ahli perniagaan antarabangsa dan teks yang disangkal tersebut tidak diedarkan secara meluas, ganti rugi berjumlah RM100,000 adalah adil dan munasabah untuk membersihkan reputasi perayu yang telah dicemari oleh teks yang disangkal tersebut. Mahkamah seterusnya memerintahkan injunksi kekal terhadap responden dan kos RM100,000 kepada perayu (lihat perenggan 71–72 & 75).]

Cases referred to

Cimolai v Hall [2005] BCSC 31, SC (refd)
Dato' Seri Anwar Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492; [2010] 3 AMR 514; [2010] 5 CLJ 301, HC (refd)
Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242, CA (refd)
Goldsmith v Sperrings Limited [1977] 2 All ER 566, CA (refd)
Horrocks v Lowe [1975] AC 135, HL (folld)
Lewis v Daily Telegraph Ltd [1964] AC 234 ; [1963] 2 All ER 151; [1963] 2 WLR 1063, HL (refd)
Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 MLJ 394, HC (refd)
Malaysia Land Properties Sdn Bhd v Waldorf & Windsor [2014] 3 MLJ 467; [2014] 6 CLJ 821, CA (refd)
MD Mineralsearch Inc v East Kootenay Newspapers Ltd [2002] 209 DLR 4th 375, CA (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
SB Palmer v AS Rajah [1949] 1 MLJ 6 (refd)
Sivabalan a/l P Asapathy v The New StraitsTimes Press (M) Bhd [2010] 9 MLJ 320; [2010] 7 CLJ 885, HC (refd)
Tan Sri David Chiu Tat-Cheong v Seema Elizabeth Isoy [2021] MLJU 1426; [2021] 7 AMR 186, HC (refd)
The Citizen 1978 (Pty) Ltd v McBride [2011] 5 LRC 286 (refd)
V Radhakrishna v Alla Rama Krishna Reddy [2019] Cri LJ 302, HC (refd)

Legislation referred to

National Land Code s 340
Rules of Court 2012 O 18 r 12(1A)

Appeal from: *Tan Sri David Chiu Tat-Cheong v Seema Elizabeth Isoy* [2021] MLJU 1426 (High Court, Kuala Lumpur)

Gopal Sri Ram (with Siva Balan Karupiah, Goh Wan Ping, How Li Nee and Phylli Lim Xin Yee) (Mastura Partnership) for the appellant.
Aneera Joshini Chowdhury (with Natalie Lu Yiing Suey) (AJ Chowdhury) for the respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned judicial commissioner of the High Court ('the JC') dated 23 June 2021 wherein the plaintiff's suit for defamation per Kuala Lumpur High Court Suit No WA-23CY-10–03 of 2018 ('the suit') was dismissed after a full trial. The plaintiff in the suit (appellant before us) is Tan Sri David Chiu Tat-Cheong and the defendant is Mdm Seema Elizabeth Isoy. The JC ordered costs of RM80,000 (subject to allocator) to be paid by the plaintiff to the defendant. The High Court's decision is reported as — *Tan Sri David Chiu Tat-Cheong v Seema Elizabeth Isoy* [2021] MLJU 1426; [2021] 7 AMR 186 (HC). For convenience, the appellant and respondent in this appeal shall be referred to as plaintiff and defendant respectively.

THE ISSUE

[2] The issue is whether the publication of a 'half-truth' can constitute a false statement. In this regard, at para [9] of the memorandum of appeal dated 17 September 2021, the plaintiff has contended that the JC had erred 'in law and/or in fact in failing to hold that the publication of a half-truth constitutes a false statement'.

PARTIES

[3] The plaintiff is the chairman and founder of Malaysia Land Properties Sdn Bhd ('Mayland') which developed Waldorf & Windsor Towers Service Apartments ('W&W').

[4] The defendant is a unit owner of property at W&W and was at various points in time, a committee or sub-committee member of the W&W Management Corporation ('MC').

MAYLAND LITIGATION

[5] Mayland and the MC were involved in several legal actions. W&W is and was involved in the following suits ('Mayland litigation') in which the opposing parties are Mayland, its related entities or individuals connected to the Mayland Group:

(a) Kuala Lumpur High Court Civil Suit No 22NCvC-460 of 2011 between Mayland and W&W Joint Management Body ('JMB');

(b) Court of Appeal Civil Appeal No W-02(NCvC)(W)-1150–05 of 2012 between Mayland and the JMB;

(c) Federal Court Civil Application No 08(f)-260–04 of 2013(W) between Mayland and the JMB;

(d) Kuala Lumpur High Court Civil Suit No 22NCvC-13–01 of 2014 between various apartment owners and Mayland;

(e) Kuala Lumpur High Court Civil 22NCvC-298–06 of 2017 between connected person and the MC;

(f) Kuala Lumpur High Court Civil 22NCvC-374–07 of 2017 between Mayland;

(g) Court of Appeal Civil Appeal No W-02(IM)(NCvC)-1918–09 of 2017 between Mayland connected persons and the MC;

(h) Kuala Lumpur High Court Application for Judicial Review No WA-25–323–12 of 2017 between a Mayland connected person, the MC and Datuk Bandar Kuala Lumpur; and

(i) Court of Appeal Civil Appeal No W-02(IM)(NCvC)-1454–07 of 2017 between a Mayland connected person and the MC.

[6] In relation to the Mayland litigation, various issues and matters between W&W and Mayland, its related entities or individuals connected to the Mayland group were litigated or are in the midst of litigation, including:

(a) the JMB successfully reclaiming a substantial portion of the 7th floor of W&W from *Mayland who had been found guilty of fraud and/or false misrepresentation in obtaining the title to the same. Mayland was found to have perpetrated fraud and/or false misrepresentation at the land office and JUPEM (the Malaysian Department of Survey and Mapping*);

(b) 47 W&W owners initiating a class action against Mayland seeking compensation for costs incurred in renovating the unfinished portion of the 7th floor of W&W;

(c) the MC claiming unpaid contribution of maintenance fees and sinking fund (approximately RM1m) against a Mayland connected person in respect of 414 parking bays linked to one residential apartment unit at W&W and operated as a commercial car park;

(d) the MC obtaining an interim injunction to remove proxies of Mayland and its related entities from holding positions in the W&W Management Committee due to irregularities at the 2017 AGM which contravened the laws on strata management. Had this injunction not been granted, the W&W Management Committee would have consisted solely of three proxies of Mayland and its related entities; and

(e) the MC successfully appealing the injunction that had been granted which had allowed a Mayland related entity to attend the 2017 AGM.

WHATSAPP GROUP

[7] The defendant and 55 other unit owners were part of a WhatsApp group. The administrator of the WhatsApp group at the material time was one Mr Curtis Brinton ('Curtis'). Curtis did not testify at the trial. WhatsApp was the platform to enable unit owners to disseminate and discuss all matters and issues of and concerning the MC and in particular, matters concerning the MC's legal disputes with Mayland and its associates.

[8] It is not in dispute that in one of the legal actions, the High Court made a finding that *Mayland* had *defrauded* and/or made *false representations* to W&W owners in respect of a common area in W&W. On appeal, the Court of Appeal upheld the High Court's findings. The judgment of the Court of Appeal is reported as *Malaysia Land Properties Sdn Bhd v Waldorf & Windsor* [2014] 3 MLJ 467; [2014] 6 CLJ 821 (CA). The legal action arose out of a dispute between MC and Mayland regarding the whole of the 7th floor of W&W.

[9] Mayland contended that the 7th floor was privately owned by them and was not part of common property. The MC contended otherwise and sought a declaration that Area 'A' of the 7th floor which was registered in Mayland's name was not indefeasible under s 340 of the National Land Code. The Court of Appeal upheld the High Court's finding that area 'A' of the 7th floor was common property and that Mayland had obtained the strata title through fraud and/or misrepresentation perpetuated on the Land Office and the Jabatan Ukur dan Pemetaan Malaysia (JUPEM), being the issuing authority (see para 55(k) of the Court of Appeal's judgment).

[10] Mayland's leave to appeal to the Federal Court was subsequently dismissed.

[11] In 2021, a High Court has made a similar finding against Mayland, now in respect of *414 carparks which were unlawfully obtained*. The matter is pending appeal at the Court of Appeal.

[12] Hence, it is quite clear that in light of the findings of fraud and misrepresentation made by the High Court and Court of Appeal against Mayland, any suit by Mayland for defamation based on any publication which attributes fraud and false misrepresentation against Mayland vis a vis the 7th floor of W&W Tower would be an exercise in futility as the suit will be defeated by the defence of justification. In the present case, there was no suit by Mayland for defamation. Rather the defamation suit is by the plaintiff who is the Chairman and founder of Mayland.

HALF-TRUTH

[13] The gravamen of the plaintiff's complaint is that the defendant had defamed him and injured his reputation as a businessman of international repute by publishing a 'half-truth' via a text message in the WhatsApp group. The impugned text message contained serious allegations which were directed at Mayland, the plaintiff, his family members and the Chiu family. There is no dispute that sometime in 1980s the plaintiff and his father were arrested and charged for offences involving financial misconduct in Hong Kong. Later, around 1996, the plaintiff and his father were 'acquitted'. These facts are in the public domain.

IMPUGNED TEXT

[14] The impugned text message dated 17 August 2018 at 22:15:14 and 22:16:22 ('impugned text') is as pleaded:

> In order for owners to know all the facts, I believe we have to step back even more and ask 'Who is Mayland?'
>
> Mayland is the CHIU family. So who is this Chiu family?
>
> Let's have a very brief look at the publicly known facts about this family:
>
> > The Chiu family is an extremely rich and successful family originating from China, then based in Hong Kong. Now with business in many countries, including Malaysia.
>
> I'm always happy for people's happiness and good fortune but ...
>
> > *Deacon Chiu (Sr) has been in the past arrested and charged with conspiracy to falsify documents of the Far East Bank, where they were the major shareholders*. For *plotting to defraud the Commissioner of Banking by making false claims* concerning the ownership of companies to which the bank had made advances of $352.5 million.
> >
> > Duncan Chiu (Deacon Sr's son) has in the past been arrested for allegedly breaching the Theft Ordinance and the Companies Ordinance.
> >
> > *David Chiu* (Deacon Sr's son) has been in the past *arrested and charged for the same offenses as Deacon Sr*. He also *faced charges of conspiring to falsify documents purporting to show that more than $246 million in credit facilities had been granted to the bank by various companies*.
>
> And now the climax to this family saga:
>
> > *The same don (David Chiu) is the Founder and Chairman of Mayland!!!*
>
> *Mayland has been convicted of Fraud and Misrepresentation against W&W owners*:
>
> > At High Court level
> >
> > At Court of Appeal level

At Federal Court level

The apple doesn't fall far from the tree …

Please google these names to read more.

*the same son (Emphasis added.)

[15] The defendant almost immediately corrected the word 'don' which appeared in the first version of the impugned text to read as 'son'. During the trial, the plaintiff accepted that the word 'don' was a typographical error and that it should read as 'son'. Thus, there is no basis for the plaintiff to say that the defendant had sought to portray the plaintiff as a 'don' which is a euphemism for 'head of a mafia' or the head of a criminal enterprise or organisation.

DEFAMATION — ORDINARY AND NATURAL MEANING

[16] The plaintiff pleaded that the impugned text, in its ordinary and natural meaning, meant and was understood to mean that:

(a) plaintiff is a fraudster;

(b) plaintiff is a fraudster because of his family heritage;

(c) plaintiff is dishonest and untrustworthy because of his family heritage;

(d) plaintiff has been convicted of fraud;

(e) plaintiff has committed fraud against W&W owners;

(f) plaintiff has misrepresented to W&W owners;

(g) plaintiff was convicted of fraud at the High Court level;

(h) plaintiff was convicted of fraud at the Court of Appeal level;

(i) plaintiff was convicted of fraud at the Federal Court level; and

(j) plaintiff is Don and is associated with the criminals or underworld.

DEFAMATION — INNUENDO MEANING

[17] The plaintiff further pleaded that the impugned text, by way of innuendo, was to be understood to mean that:

(a) plaintiff is dishonest and untrustworthy;

(b) plaintiff has committed fraud and misrepresentation;

(c) plaintiff comes from a family of fraudsters or criminals;

(d) plaintiff was convicted because of fraud committed against W&W owners;

(e) plaintiff was convicted because of misrepresentation against W&W owners; and

(f) plaintiff has served jail time.

RELIEFS

[18] In the statement of claim, plaintiff prayed for the following reliefs:

(a) damages of RM1.5m or general damages including aggravated damages to be assessed;

(b) an order that defendant publishes an apology in leading Chinese newspaper, English newspaper and Bahasa Malaysia newspaper for a period of 14 days consecutively; and

(c) an injunction to restrain the defendant from publishing or spreading the impugned text or similar defamatory words.

DEFENCE

[19] The defendant's defence was that the impugned text was not defamatory of the plaintiff.

[20] And if it is defamatory, then the defendant pleads that: (a) the same was justified and/or based on information that was available in the public domain; (b) made in good faith, not in malice; (c) made as a matter of fair comment in the interest of the participants of the WhatsApp group and/or that it was published on an occasion of privilege and for the benefit of the participants in the WhatsApp group.

[21] In so far justification is concerned, the defendant pleaded at para [9] of the re-amended defence as follows:

(i) The Chiu family is indeed an extremely rich and successful family originating from China, then based in Hong Kong and who has businesses in many countries, including Malaysia;

(ii) The individuals known as Deacon Chiu (Sr), Duncan Chiu and David Chiu (the plaintiff) have been arrested and charged with criminal offences in the past. These offences were, inter alia, in respect of corporate crimes such as conspiracy to defraud and falsify documents;

(iii) Deacon Chiu (Sr) has indeed been accused in the past of plotting to defraud the Commissioner of Banking by making false claims concerning the ownership of companies to which the bank had made advances of

(iv) $352.5 million. Deacon Chiu (Sr) had also faced charges of conspiring to falsify documents purporting to show that more than $246 million in credit facilities had been granted to the bank by various companies;

(v) Duncan Chiu has been arrested for allegedly breaching the Theft Ordinance and the Companies Ordinance in the past;

(vi) The plaintiff comes from the said Chiu family;

(vii) The plaintiff himself had been accused of involvement in the conspiracy (as pleaded in paragraph 9(iii) above); and/or

(viii) The plaintiff is the founder and chairman of Mayland. Mayland was found liable for fraud and false misrepresentation against W&W. This was litigated all the way up to the Federal Court.

[22] The issue is whether what was published was a 'half-truth' and whether it amounts to 'no truth' ie falsity. In *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394 (at p 415) Varghese George J (as he then was — later JCA) said:

> Half-truths are no truth at all and definitely bear out an intention to deliberately mislead and malign unfairly the party who was the subject of such statement, in this case, the plaintiff.

[23] The defendant maintains said that her focus was on Mayland and that the words in the impugned text referring to the plaintiff are true as the plaintiff himself had, in the past, been arrested and charged for criminal offences, which was publicly reported both in the press and through Hong Kong legal journals which was used by the defendant as the source of her text. The defendant pleaded the defence of justification, qualified privilege and fair comment.

DEFAMATORY TEST

[24] The test for determining whether the words appearing in the impugned text are defamatory may be seen from the decision of Harminder JC (now FCJ) in *Dato' Seri Anwar Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 3 AMR 514; [2010] 5 CLJ 301 (HC) where the learned judge referred to the principles in the following paragraphs:

> [13] The Defamation Act 1957 is silent on what constitutes defamatory matter. The courts have followed closely the law in England. Even then there is no single, uniform or comprehensive definition of what constitutes defamatory matter.
>
> [14] In *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p 58, Mohd Azmi J (as he then was) set out the defamatory test as follows:
>
> > Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the

A statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

B [15] In *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, Richard Malanjum J (as he then was) followed *JB Jeyaretnam v Goh Chok Thong* [1985] 1 MLJ 334 and adopted the following approach:

C As to whether the words complained of in this case were capable of being, and were in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally.

[16] The Court of Appeal also had occasion to deal with this issue in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374. Speaking for the court, Gopal Sri Ram JCA (as he then was) said:

D

In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonorable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

E

...

[20] The defamatory nature of an imputation also cannot be judged in isolation. It has to be ascertained by reference to the moral or social standards of society generally. This is an important part of the consideration of what constitutes

F defamatory matter. Such *societal standards are not amenable to evidentiary proof. It will be up to the judges to consider the requisite standards when determining whether a matter is either capable of being defamatory or is in fact defamatory*. The case law suggests that *the standard that is usually adopted is that of ordinary reasonable people* (see *Jones v Skelton* [1963] SR (NSW) 644) who are of fair average intelligence (see *Slatyer v Daily Telegraph Newspaper Co Ltd* [1908] 6 CLR 1 at p 7) but who are not

G avid for scandal (see *Lewis v Daily Telegraph Ltd* [1964] AC 234 at p 260).

This *person may engage in some degree of loose thinking* (see *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 at p 1162) or reading between the lines (see *Farquhar v Bottom* [1980] 2 NSWLR 374 at p 380) but he or she should not be unduly

H suspicious (see *Keogh v Incorporated Dental Hospital of Ireland* [1910] 2 Ir R 577). As such, *an ordinary reasonable person would presume that a man is innocent until proven guilty although the reality might sometimes be otherwise. This is necessary to protect the media who go no further than merely to report that a person is being investigated by police or has been arrested and charged with a criminal offence*.

I ...

[29] The sting of these statements was to show that the plaintiff had abused his political position for personal gain. Ordinary right-thinking members of society will think that here is a person with no integrity, dishonest, corrupt and an untrustworthy leader and politician. It is safe to conclude that the effect of the article would certainly lower the plaintiff in the estimation of ordinary, right-

thinking members of Malaysian society. There would certainly be some degree of hatred, contempt or ridicule. I was therefore persuaded that the impugned article was indeed defamatory. (Emphasis added.)

HIGH COURT

[25] As stated earlier, the JC held that the impugned text was not defamatory of the plaintiff. The following parts of the JC's grounds of judgment deal with the issue *whether the impugned text is defamatory* and they read as follows:

[22] I find that the impugned text is not defamatory of P when read in totality and as a whole. The natural and ordinary meaning or imputation of the impugned text is that:

(a) there are a number of individuals in the Chiu family, including P, who have been arrested and charged for alleged or purported crimes;

(b) this was in the past;

(c) P is the founder and Chairman of Mayland;

(d) Mayland has been found guilty of fraud and misrepresentation against W&W owners by the Malaysian courts.

[23] The aforesaid was stated as a matter of listed and observable facts, divorced from emotion or speculation. And D went no further than that. Hence I conclude that no defamatory imputation can be accorded to the impugned text.

[24] I am of the opinion that the impugned text does not, expressly or impliedly, convey the meanings pleaded by P:

(a) The words 'fraud', 'fraudster', 'dishonest', 'untrustworthy', 'misrepresented', 'convicted' or any other words inferring the like were never used in relation to P. There is no imputation that P has served jail time because of conviction. The impugned text only conveys the meaning that Mayland was found guilty of fraud and misrepresentation against W&W owners.

(b) The impugned text conveys that three persons from the same family have been arrested and charged in the past. But this cannot mean that P is a fraudster or criminal by heritage. A reasonable reader would not believe or give credence to the imputations alleged by P. To do so would be a fallacy and unnatural leap in logic.

(c) The word 'don' was mentioned initially. But it was a typo and immediately thereafter corrected to 'son'. A reasonable reader would understand and know this. The words 'criminal' or 'underworld' were never mentioned, nor can it be inferred.

[25] D explained that she had used an asterisk (*) to correct the word 'the same don' to 'the same son' as soon as she realised the misspelling. This is a common way of correcting a misspelling on WhatsApp. The letters 's' and 'd' are next to each other on the mobile phone key pad used in the WhatsApp application. I believe this

explanation which sounded plausible. Moreover, the correction was done in the space of a minute. Namely at 10:16 p.m. The initial message was sent at 10:15 p.m.

[26] Actually, P and his counsel conceded this point during cross-examination:

> Q: ... My question is, do you agree with my suggestion that the asterisk followed by the words, 'the same son' is there to correct the phrase 'the same don'. Or you don't know?
>
> A: I think so, yes.
>
> Q: Ok, so you agree? A :Yes.
>
> ...
>
> A: Yes, I'm the same son. Yes, yes. Ok.
>
> Q: Ok, so he's agreed to it. It's a correction.
>
> P/C: Yang Arif, just for the record, there's no dispute to that. There's no dispute to that.

[27] The impugned text was reproduced in the SOC and in P's witness statement (at Q&A 17) in its incomplete form. Namely, without the correction in asterisk of 'don' to 'son'. This unduly skews and colours the perception of the impugned text. Without 'don', there can be no potential imputation of P being a criminal in the underworld.

[28] Throughout the impugned text, clear words were used to distinguish P's arrest and charges, and the finding of fraud made against Mayland. When speaking of P, D's words were 'in the past arrested and charged', 'faced charges' and 'purporting'. This is to be distinguished from the wording used when it comes to Mayland which were 'has been convicted of fraud and misrepresentation'.

[29] *The dichotomy of the wording must be taken into account as P was clearly referred to in a way that was different and distinguishable from Mayland. Hence any imputation of fraud, dishonesty, untrustworthiness, misrepresentation, conviction and such like can only be in respect of Mayland, if at all. By virtue of the dichotomy, it cannot be in respect of P.*

...

[32] In my view, *the ordinary and natural meaning and innuendo meaning of the impugned text does not impute to P a conduct which is dishonourable or discreditable. It does not tend to lower P in the estimation of right-thinking members of society generally. It does not expose P to ridicule, contempt or hatred. Accordingly, my conclusion is that P has not proven, on a balance of probabilities, that the impugned text is defamatory of him.*

Second element — Whether the impugned text refers to plaintiff

[33] Admittedly, the impugned text refers to P. The fourth bullet point stated that P (Deacon Sr's son) has been in the past arrested and charged for the same offences as Deacon Sr. The fifth bullet point stated that the same 'son' is the founder and Chairman of Mayland. But as discussed earlier, those words are not defamatory of P.

[34] I accept D's explanation that the focus of her WhatsApp text was on Mayland. The WhatsApp group was a private group chat operated in a protected setting. Its purpose was to spread information and awareness of issues and events concerning W&W between W&W owners. There was discussion, feedback and exchange of updates, concerns, opinions, critique, information and documents between the participants.

[35] The matters discussed in the WhatsApp group were, amongst others: (a) maintenance and management of W&W, (b) its MC (management corporation), (c) financial and legal matters of W&W, (d) issues affecting W&W or the owners of W&W, (e) raising awareness and rallying the support of the owners of W&W in respect of W&W issues and to participate in AGMs and meeting with the MC, (f) concerns about the possible mismanagement of owners' funds by the MC, (g) concerns about the possible violations of the Strata Management Act by the MC, and (h) suggestions and solutions on how best to resolve W&W issues. This is evident from the thread of messages in the WhatsApp group contained in the bundle of documents.

[36] P complains that the statement 'Mayland is the Chiu family' is factually wrong. Because in the Chinese context, Chiu family includes all his siblings and relatives amounting to about 200 people. According to P, a more accurate description would have been 'Mayland is David Chiu and family'. That may very well be so but I think it is quite irrelevant as the said statement, in any event, is not defamatory.

[37] Next, P takes offence at the statement 'Mayland has been convicted of Fraud and Misrepresentation against W&W owners'. However, that statement does not refer to P but rather to Mayland. And Mayland is not the plaintiff here.

[38] As the words referring to P are not defamatory, I find, on a balance of probabilities, that P has failed to prove his case for defamation against D.

[26] As for the 'half-truth' issue the JC said that it was untenable. The JC's reasoning may be gathered from the following paragraphs from the grounds of judgment:

[84] P's argument of 'half-truth' is untenable. Malaysian case laws show that when an allegation is made, an ordinary reasonable reader would understand it to be just an allegation. Stating that P was in the past arrested and charged, which fact and imputation are true, cannot constitute defamation.

[85] At worse, D might perhaps be said to have been robust and overzealous in sending the impugned text without disclosing that the charges against P were withdrawn. But I think that is mitigated by the disclaimer which invited the readers to do their own research and find out more. Furthermore, robust and even outrageous statements do not negate the fair comment defence.

[27] In so far as dragging the plaintiff into the impugned text is concerned, the JC said there was a need to raise awareness and for the W&W owners to be informed of the 'players' in the Mayland litigation. In this regard the JC said:

[61] Because of the litigation in which Mayland and its related entities have interests antithetical to W&W owners, there was a need to raise awareness of who and what

A Mayland was. Particularly in the light of an impending EGM in which collective action of owners would be required. It therefore is a matter of interest, rather than disinterest, for W&W owners to know the players in the litigation matters involving W&W and W&W owners' interests.

B DISCUSSION

[28] We shall start with the issue of malice as our finding on this part of the case will deal with the defence of qualified privilege and fair comment. Thus, assuming that the impugned text was defamatory, the JC concluded that there C was no malice on the defendant's part which would have defeated the defence of qualified privilege and fair comment. In law, a person would be regarded as being actuated by malice if he was reckless or indifferent to the truth. The judgment of Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at p 150 is instructive on this point. Lord Diplock said,

D

> if he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false.

E **[29]** In *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173, Wan Hamzah J (as he then was) discussed the topic of malice in the following terms:

> Where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, malice may rightly be inferred.

F

[30] Here, the defendant was fully aware that the plaintiff was 'acquitted' of the charges of financial misconduct and that these events occurred at least two decades ago. There was no rhyme or reason for the defendant to have 'raked' up G the plaintiff's past in connection with the arrest and charge, which ultimately resulted in an acquittal. The defendant was adamant that she was 'not reckless' when she wrote the impugned text. We do not think that this was a case of recklessness. Rather, it is a case where the defendant was fully aware that the plaintiff had been acquitted of the charges involving financial misconduct but H she chose not to disclose this to the participants in the WhatsApp group.

[31] She painted only 'half' the picture. She said that she asked the participants to look it up themselves. We do not think that such a disclaimer will exonerate the defendant from liability for defamation as she, being the I author of the impugned text, must take responsibility for its contents.

[32] It is quite apparent that the defendant deliberately chose not to disclose the fact that the plaintiff had been acquitted of the charges of financial misconduct. Therein lies the element of malice on the defendant's part. It is

clear and obvious that non-disclosure of the plaintiff's acquittal was deliberate and this was hardly 'fair' to the plaintiff.

[33] Thus, having regard to the totality of the facts and circumstances, we are inclined to agree with the submissions that were made on behalf of the plaintiff that the defendant had displayed an indifferent attitude which significantly warranted an inference of malice. In the circumstances, our finding of malice on the defendant's part demolishes the defence of qualified privilege and fair comment.

[34] Before we leave this topic, we feel it is necessary for us to deal with one aspect of the defence of qualified privilege and it is this. The defendant said that her focus was on Mayland and that she brought in the plaintiff and his family so that the participants of the WhatsApp group can make up their own minds.

[35] Of course, there was a need for discussion on the Mayland litigation and Mayland's corporate misconduct but how does the fact that the plaintiff was arrested and charged more than 20 years ago become relevant and necessary for purposes of discussion within the WhatsApp group, especially since he was acquitted more than two decades ago? We do not see any permissible or legitimate purpose for disclosing the facts pertaining to the arrest and charge which took place more than 20 years ago.

[36] What we do see is that the facts pertaining to the arrest and charge against the plaintiff, were carefully juxtaposed with the judicial findings of fraud and misrepresentation against Mayland and this was a clear and unmistakable invitation to the participants of the WhatsApp group to equate the plaintiff with Mayland, and to reasonably form the view that the plaintiff is dishonest, and a fraudster with a criminal heritage.

[37] In the circumstances, the only relevant and remaining question is whether it is defamatory to publish a statement that the plaintiff was arrested and charged for an offence concerning financial misconduct when it was known to the defendant that the plaintiff had been acquitted several years earlier? Here the impugned text was circulated on 17 August 2018 when the plaintiff's arrest (and that of his father) took place in the late 1980s and both were acquitted in around 1996. These are facts which were in the public domain and were known to the defendant before she sent the impugned message.

[38] The defendant did her research and was apprised of the fact that the plaintiff and his father were acquitted of the offence with which they were both charged in Hong Kong. She was not mistaken about the status of the criminal

proceedings against the plaintiff. She knew that the plaintiff had been acquitted. However, the fact relating to the plaintiff's acquittal was not mentioned in the impugned text.

[39] In cross-examination, the defendant claimed that she was 'fair' and not reckless when she wrote about the plaintiff. The defendant said that whilst she did not mention that the plaintiff was acquitted, she also never said that he had been convicted.

[40] As to why she even mentioned the plaintiff in the impugned text, the defendant's answers may be gathered from the following parts of her testimony when she was cross-examined by Dato' Seri Gopal Sri Ram who had conducted the trial and argued the appeal on 15 December 2022. However, regrettably, Dato' Seri Gopal Sri Ram passed away on 29 January 2023. The defendant's testimony was as follows:

> ...
>
> GSR: No, no. Are you now saying that your, your WhatsApp was a fair statement to David Chiu?
>
> SEEMA: Fair comment, yes.
>
> GSR: It was fair?
>
> SEEMA: Yes.
>
> GSR: But it was not true.
>
> SEEMA: *Everything I wrote was true*.
>
> GSR: So do you agree with me that if you had included that, that would have been a fairer statement to him?
>
> SEEMA I disagree. Because I said google this to read more.
>
> GSR: No, no. So you left the reader to look out for himself.
>
> SEEMA: I wasn't providing any full story. I was just giving some facts. My focus was on Mayland.
>
> SEEMA: ... *It was all about Mayland* and what happened in W&W condo. *So I just mentioned certain, certain things in the history of the Chiu family and I wanted the owners to make up their own minds* that, google it, *read up for yourself* . They're all intelligent people.

[41] No doubt the defendant had inserted a disclaimer 'Please google these names to read more' at the end, whereby she had urged the WhatsApp group chat participants to find out more and inform themselves of matters concerning W&W. She said that the impugned text was not meant to be any full account of W&W matters.

[42] In response, counsel for the plaintiff argued before us that there is no duty on the part of the reader to conduct research to ascertain the truth. Thus, if the impugned publication consists of a 'half-truth' which gives an untrue or false impression of the plaintiff, then the defendant is liable for having published a false statement of and concerning the plaintiff.

[43] As far as the JC was concerned, his findings were that the impugned text was not defamatory when read in totality and as a whole. The JC opined that upon considering the wordings of the impugned text in totality and as a whole, the natural and ordinary meaning or imputation of the impugned text in the eyes of an objective reader was not defamatory, and instead meant:

(a) that a number of individuals in the Chiu family, including the plaintiff, have been arrested and charged for purported crimes;

(b) that this was in the past;

(c) that the plaintiff is the founder and chairman of Mayland; and

(d) that Mayland has been found guilty of fraud and/or false misrepresentation against the owners of W&W.

[44] The JC held that, in any event, the defendant's pleaded defence of justification has been proven on a balance of probabilities. The JC also held that, in any event, the defendant's pleaded defence of fair comment has been proven on a balance of probabilities. According to the JC, there was no malice on the part of the defendant.

[45] It was submitted for the defendant that the JC had properly and correctly looked at the words used and noted their meanings:

(a) throughout the impugned text, clear words were used to distinguish the fact of the plaintiff's arrest and charges vs the finding of fraud and misrepresentation made against Mayland;

(b) when the impugned text was about the plaintiff, the defendant used clear words such as 'has been in the past arrested and charged', 'faced charges' and 'purporting' and this is to be distinguished from the wording the defendant used when the Impugned Text was about Mayland, such as 'has been convicted of fraud and misrepresentation';

(c) the clear dichotomy of the words used between arrested and charged and purporting vs convicted shows the different treatment in the subject of the plaintiff and Mayland; and

(d) the plaintiff was clearly referred to in a way that was different and distinguishable from Mayland, hence any imputation of fraud,

dishonesty, untrustworthiness, misrepresentation, conviction and such can only, if at all, be attributed to Mayland, not the plaintiff.

[46] Thus, the JC agreed with and accepted the defendant's testimony that there was a distinction between those parts of the impugned text which referred to Mayland and those concerning the plaintiff. According to the defendant, the average reasonable reader, not avid for scandal would suspect but would not conclude that the plaintiff was guilty of fraud, misrepresentation or dishonesty.

[47] In our view, the JC erred in accepting the defendant's explanation that there was a so-called 'dichotomy' in the way in which the plaintiff and Mayland were described. No doubt different words were used by the defendant in describing the plaintiff as compared with Mayland. But it would be wrong to dissect the impugned text and to view the statements in isolation.

[48] What must be done is to view that impugned text as a whole. And the impugned text as a whole gives the clear impression that the plaintiff is guilty, liable for, or predisposed to dishonesty, fraud or misrepresentation. Therein lies the 'sting' of the impugned text.

[49] It is relevant to mention that, on 27 August 2017, Curtis, qua administrator of the WhatsApp group removed the defendant from the WhatsApp group and rebuked her in the following words which were posted in the WhatsApp Group:

> Seema *you have knowingly posting false and misleading information on this chat group and when questioned have refused to take responsibility*.
>
> I'm not going to take any time explaining to you other than to say your contributions are not constructive and take advantage of the group members' lack of knowledge about our current situation.
>
> *I cannot allow you or anyone to continue a campaign of misinformation*.
>
> Notice to all:
>
> *Verify what you post and take responsibility for it*. The people on the chat depended on this information to make intelligent decisions. (Emphasis added.)

[50] Of course, we cannot say anything more about the defendant's removal from the WhatsApp group or as to what had motivated Curtis to do what he did since he did not testify. But it is clear that the impugned text was causally connected to the defendant's removal from the WhatsApp group.

[51] The defendant consistently maintained that what she said in the impugned text about the plaintiff being arrested and charged is true. It was argued that she was just reporting the fact that the plaintiff had been arrested and charged and that this is not to be equated with guilt. According to the

defendant, the average reasonably minded reader, not avid for scandal, will not conclude that the plaintiff is guilty of the offences for which he was charged.

[52] Counsel for the defendant referred to the High Court decision in *Sivabalan a/l P Asapathy v The New StraitsTimes Press (M) Bhd* [2010] 9 MLJ 320; [2010] 7 CLJ 885 (HC) ('Sivabalan') where the High Court had dismissed the plaintiff's claim for defamation. In that case, the plaintiff who was a self-proclaimed spiritual healer was accused of having raped one of his disciples. The newspaper article gave details of the alleged rape incident but they had couched it in such a manner as not to suggest guilt.

[53] The judge in *Sivabalan*'s case said that the newspaper had merely reported that the plaintiff had been arrested on suspicion of having committed rape. The judge in *Sivabalan*'s case said:

> [18] To my mind, on plain reading of exh P1, it becomes clear that the news report merely makes an allegation of rape, among others, against the plaintiff as opposed to saying that the plaintiff is guilty of rape and the several other allegations. This is clear from the heading of the news report by the use of the word 'alleges' including the use of the words in the body of the news report such as 'allegedly' (first paragraph), 'apparently' (second paragraph), 'suspicion' (third paragraph) and 'allegedly' (fourth paragraph). Thus, the 'sting' of the offending news report is that the plaintiff is merely suspected or alleged to have committed the several acts referred to and that the police have detained him merely for investigations

[54] We do not think that the defendant can say that the impugned text is just a 'mere reporting' and that she could rely on *Sivabalan*'s case. The impugned text here was not 'mere reporting'. Rather, it was a well scripted text with a clear purpose to impugn the plaintiff's reputation so that the participants of the WhatsApp group form the view that the plaintiff and Mayland are one and the same and that just as Mayland was found liable for fraud and misrepresentation, the plaintiff too is dishonest and a fraudster as he had been arrested and charged with offences involving financial misconduct.

[55] In *The Citizen 1978 (Pty) Ltd v McBride* [2011] 5 LRC 286, the issue of 'half-truth' was discussed by Ngcobo CJ in his dissenting judgment where he said:

> [138] Cameron J upholds the fair comment defence in relation to all but the statement that Mr McBride is not contrite.
>
> He holds that the statement that Mr McBride is not contrite for planting a bomb that killed civilians during the struggle against apartheid is untrue and, to the extent that it is a comment, that it is not supported by facts accurately stated.
>
> As the facts upon which a fair comment is based must be true, the defence in relation to this statement must fail. I agree. The statement was simply false. *However, I am unable to agree with his conclusion in relation to the statement that Mr McBride had a*

A *dubious flirtation with alleged gun dealers in Mozambique. This statement is based on a half-truth and is, therefore, also untrue*.

...

None of the articles that appeared in The Citizen mentioned these facts, in particular, the explanation that the charges were quashed by the Supreme Court of Mozambique. Reference to the quashing of the charges was vital information as it would have enabled the reader to understand why Mr McBride was released. The omission of this information, in my view, resulted in the facts relating to the arrest and release of Mr McBride in Mozambique to be a half-truth. The facts relating to Mozambique were therefore not accurately stated. (Emphasis added.)

[56] In *MD Mineralsearch Inc v East Kootenay Newspapers Ltd* [2002] 209 DLR 4th 375 ('Mineralsearch'), the British Columbian Court of Appeal held as follows:

The trial judge correctly identified the problem, however, that *in some cases a report made up of only true facts may still present an untrue impression. Although the article contained only the true facts of the conviction, it gave an impression* of the respondent that the trial judge said 'was *misleading and potentially damaging to its reputation*'. The respondent's complaint was not about the true contents of the article, but the false impression the article gave that the respondent set out to deceive consumers or potential consumers by committing a 'deceptive business practice'. *Because the impression created by the article was false, truth cannot be relied on as a defence*. (Emphasis added.)

[57] Counsel for the plaintiff also referred to the decision of the Indian High Court of *V Radhakrishna v Alla Rama Krishna Reddy* [2019] Cri LJ 302 where it was held as follows:

Sometimes the media present twisted or *distorted news that may contain an element of truth but also an element of untruth*. This, too, should be avoided because *a half-truth can be more dangerous than a total lie*.

[58] In *Cimolai v Hall* [2005] BCSC 31 para 173, Justice Holmes opined that the defence of justification will fail if the overall impression of the impugned publication is false. The relevant passage from the judgment reads as follows:

[I]f the overall impression of the publication is false, the defence fails even if some or even all of the literal words are proven to be true. *Half-truths can be just as damaging as outright falsehoods*, and their effect may be even more severe because they can be more difficult to explain.

[59] But in the present case, the JC ruled out half-truths as forming part of the Malaysian law of defamation. That finding is at para 84 of the judgment. It reads as follows:

84. P's argument of 'half-truth' is untenable. Malaysian case law show that when an

allegation is made, an ordinary reasonable reader would understand it to be just an allegation. Stating that P was in the past arrested and charged, which fact and imputation are true, cannot constitute defamation.'

[60] The question ultimately is whether the impugned text is defamatory of the plaintiff. We are satisfied that the impugned text is defamatory of the plaintiff.

[61] In this regard, we have no doubts that the words in the impugned text convey to the ordinary man that the plaintiff is dishonest and a fraudster. That, to our mind, was the real purpose of dragging the plaintiff into the epicenter of the impugned text.

[62] Whilst it was legitimate for the defendant to discuss Mayland's conduct, behavior, misconduct or other unlawful activity, the action of the defendant to equate the plaintiff with Mayland and ascribe or impute Mayland's wrongful conduct to the plaintiff by reason of his previous arrest and criminal charge, of which he was acquitted and which was not mentioned in the impugned text, renders the impugned text to be inherently and egregiously defamatory of the plaintiff.

[63] As Lord Reid said in *Lewis v Daily Telegraph Ltd* [1964] AC 234 ; [1963] 2 All ER 151; [1963] 2 WLR 1063 (HL) at p 258 (AC):

> ... *more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning*. The statement in the impugned text which referred to the plaintiff which was juxtaposed with the attack on Mayland's conduct, when considered in the context of the whole article, in its natural and ordinary meaning definitely had the tendency to disparage and injure the plaintiff's standing, character and reputation. Those statements definitely had the tendency to excite the adverse opinion of those within the WhatsApp group against the plaintiff.

[64] The defendant had knowledge or means of knowledge that the statement she made about the plaintiff was only a half-truth. This is because she in her own evidence has referred to media. What the defendant did was merely to insert a so-called 'disclaimer' at the end of the posting by asking the recipients to 'Google' these names to read more.

[65] Counsel said that this is nothing more than posting a half-truth and asking the readers to look out for themselves, the other half on Google. We agree. The disclaimer does not give the defendant a free pass such that it exonerates her from liability for having defamed the plaintiff. It was argued before us that the defendant cannot be held liable for what she did not write about the plaintiff.

[66] In response, we would say, 'The logic is superficially attractive; but the conclusion is suspect' (see: Lord Scarman in *Goldsmith v Sperrings Limited* [1977] 2 All ER 566 (CA) at p 582). And the reason we have given short shrift of this part of the defendant's argument is that the omission to paint the full picture is the very nature and essence of the concept of 'half-truth' which establishes liability for defamation in circumstances where the failure to present the requisite information portrayed a false impression in the minds of the ordinary person.

[67] As we explained earlier, first, the defendant failed to give the full picture of the plaintiff's previous legal problems in Hong Kong, and secondly, the plaintiff's previous legal problems in Hong Kong being juxtaposed with the judicial findings of fraud and misrepresentation against Mayland gave the (false) impression that the plaintiff is a fraudster and is dishonest. Thirdly, there was no legitimate reason or justification for making any reference to the plaintiff in the impugned text. It was done for the obvious purpose of highlighting Mayland's unlawful conduct and to equate the plaintiff with Mayland, and in the process to malign the reputation of the plaintiff.

[68] Thus, as was stated by the British Columbian Court of Appeal in *Mineralsearch*, 'Because the impression created by the article was false, truth cannot be relied on as a defence'.

[69] Thus, even if the fact that the plaintiff was previously arrested and charged is true, the defence of justification fails as the impression created by the impugned text was one of utter falsity. The false impression that was created was that the plaintiff was convicted, was a dishonest person, and a fraudster.

[70] As we said earlier, the mere mention of the plaintiff's name in the impugned text and juxtaposing the plaintiff's name together with the judicial findings of fraud and misrepresentation against Mayland had the effect of tarnishing the plaintiff's reputation. In short, the plaintiff was defamed because the words used in the impugned article which referred to the plaintiff's arrest and charge had taken a sinister colour by being associated with the other words in the same impugned text relating to Mayland.

DAMAGES

[71] On the issue of damages, it was argued for the defendant that the plaintiff did not lead evidence on the damages that he had suffered as a result of the defamatory publication. But it is trite that in libel cases, damages are 'presumed' see: (a) *SB Palmer v AS Rajah* [1949] 1 MLJ 6 (HC); and (b) *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242 (CA) at para 55.

[72] Here, the impugned text was circulated to a limited group — within the W&W WhatsApp group. Since Curtis administered a rebuke to the defendant about ten days after the impugned text was circulated, it might be presumed that it was or may have been 'deleted'. At any rate, there is no evidence of any 're-publication'. Taking all circumstances into account, we think that the plaintiff is not entitled to RM1.5m damages as pleaded. As rightly mentioned by the JC the plea of RM1.5m in the statement of claim is contrary to O 18 r 12(1A) of the Rules of Court 2012. Considering the plaintiff's status as an international businessman and that the impugned text was not widely circulated and was sent to the participants of the WhatsApp group, damages in the sum of RM100,000 would be fair and reasonable to vindicate the plaintiff's reputation which has been sullied by the impugned text.

OUTCOME

[73] For the reasons as stated above, we find that there are merits in the appeal as the learned judicial commissioner was plainly wrong in holding that the impugned text was not defamatory of the plaintiff and in further holding that the defence of justification, qualified privilege and fair comment succeeds.

[74] As such, we allowed the plaintiff's appeal and set aside the judicial commissioner's said decision dated 23 June 2021 and entered judgment for the plaintiff. We awarded *damages in the sum of RM100,000 with interest thereon at 5%pa from 23 June 2021 until the date of full payment or realisation*.

[75] We also order that a *permanent injunction* be granted to restrain the defendant from publishing or spreading the impugned text or similar defamatory words of and concerning the plaintiff. As for costs, since the High Court granted post-trial costs of RM80,000, the same amount should now be awarded to the plaintiff in addition to the costs of this appeal. We, therefore, awarded *costs of RM100,000* (being RM80,000 (High Court costs) plus RM20,000 (Court of Appeal costs)) which is subject to payment of allocator.

Appeal allowed; JD's decision set aside with costs of RM100,000 subject to payment of allocator.

Reported by Dzulqarnain Ab Fatar